Siti Esah bt Talib v Mentiga Corp Bhd

HIGH COURT (KUANTAN) — COMPANIES (WINDING UP) PETITION NO 28–5 OF 2008
VT SINGHAM J
25 FEBRUARY 2010

Companies and Corporations — Winding up — Petition — Petition on grounds of failure to pay judgment debts — Respondent's cheque for lesser sum refused by petitioner — Whether respondent able to settle debts — Whether petition intended to exert pressure on respondent — Whether should have proceeded by way of writ of seizure and sale — Companies Act 1965 s 218(1)(e)

This was an application by the respondent to strike out the winding up petition filed by the petitioner on the ground that it was an abuse of the process of the court as the petition was filed for a collateral purpose. The said petition was filed by the petitioner as a judgment creditor pursuant to a judgment of the sessions court. The judgment sum was for RM30,538 with the interest at the rate of 8%pa and RM4,305 as costs. The statutory notice dated 17 January 2008 under s 218(2) of the Companies Act 1965 ('Act') was issued to the respondent claiming a sum of RM51,204.03. As the respondent had failed to pay the said sum within 21 days from the date of receipt of the said notice, the petition was filed in court on 28 April 2008. The respondent had, through their solicitors, sent a cheque for the sum of RM50,786.34 to the petitioner's solicitors in settlement of the judgment sum. The petitioner's solicitors however, had returned the said cheque to the respondent's solicitors on the ground that the amount was insufficient to pay all the creditors. The respondent contended that the petitioner had no basis whatsoever to rely on s 218(1)(e) of the Act because it had the ability to pay the sum stated in the winding up petition. The petitioner has opposed this notice of motion. The main issue for the court was whether the petition was filed for the sole purpose and object of recovering the judgment sum obtained by the petitioner or for any collateral purpose and to exert pressure on the respondent to settle the claims of other creditors.

Held, striking out the petition with costs:

(1) The legal battle in this notice of motion was between the petitioner and the respondent and not between the individual creditors who intended to appear on the petition and to support the petition which may be a relevant factor for consideration at the hearing of the petition and not at this stage of the hearing of the notice of motion to strike out the petition. Therefore, the supporting creditors ought not to be allowed to

participate in this hearing of the notice of motion as the issue of whether the order of winding up ought to be made or the respondent is unable to pay their debts did not arise as yet for consideration of this court and it is not a decisive consideration in so far as this notice of motion (see para 10).

(2) An unpaid creditor has a right to obtain a winding up order against a company which fails to pay its bona fide debt. However, the court has discretion to refuse the order or to strike out the petition if it is found the creditor has acted improperly by filing a petition without attempting to obtain payment by other means (see para 12).

(3) A petition for winding up a company is a serious matter as it affects the reputation of the company, in this case, a public listed company where the debt due to the petitioner was only RM50,786.34 and it could have been proceeded by way of writ of seizure and sale. The abuse of the process was clearly shown in the conduct of the petitioner who had exerted pressure on the respondent to settle not just the judgment debt due but the alleged claims of all other supporting creditors as well (see para 13).

(4) The presentation of the petition and the eagerness to proceed with the hearing of the petition is much to be desired and appears to be a calculated move to harass and embarrass the respondent, to exert pressure on the respondent to such an extent that the respondent is put under pressure to submit to the demand of the supporting creditors through the petitioner or to meet the threat or risk of being wound up. Accordingly, the cumulative effect of filing the petition and to proceed with the hearing could not have been for the sole and genuine purpose of recovering the judgment debt due to the petitioner or to protect her interest but is more of a debt collecting exercise (see para 15).

[Bahasa Malaysia summary

Ini adalah satu permohonan oleh responden untuk membatalkan petisyen penggulungan yang difailkan oleh pempetisyen atas alasan ia adalah penyalahgunaan proses mahkamah kerana petisyen yang difailkan adalah bagi tujuan kolateral. Petisyen tersebut telah difailkan oleh pempetisyen sebagai pemiutang penghakiman berikutan penghakiman oleh mahkamah sesyen. Jumlah penghakiman ialah sebanyak RM30,538 dengan kadar faedah 8% setahun dan RM4,305 sebagai kos. Notis statutori bertarikh 17 Januari 2008 di bawah s 218(2) Akta Syarikat 1965 ('Akta') telah dikeluarkan kepada responden untuk menuntut jumlah sebanyak RM51,204.03. Oleh kerana responden gagal membayar jumlah tersebut dalam masa 21 hari dari tarikh penerimaan notis tersebut, petisyen telah difailkan di mahkamah pada 28 April 2008. Melalui peguamcara beliau, responden telah mengirimkan cek berjumlah RM50,786.34 kepada peguambela pempetisyen untuk

menyelesaikan jumlah penghakiman. Walau bagaimanapun, peguambela pempetisyen telah memulangkan semula cek tersebut kepada peguamcara responden atas alasan bahawa jumlahnya tidak cukup untuk membayar kesemua pemiutang. Responden berhujah bahawa pempetisyen tidak mempunyai asas untuk bersandar pada s 218(1)(e) Akta kerana ia mempunyai kemampuan untuk membayar jumlah yang dinyatakan di dalam petisyen penggulungan. Pempetisyen menentang notis usul ini. Isu utama yang perlu diputuskan oleh mahkamah adalah sama ada petisyen difailkan khusus bagi tujuan dan matlamat untuk menuntut kembali jumlah penghakiman yang diperoleh oleh pempetisyen atau untuk tujuan kolateral dan untuk mendesak responden menyelesaikan tuntutan pemiutang-pemiutang lain.

Diputuskan, membatalkan petisyen dengan kos:

(1) Pertikaian undang-undang di dalam notis usul ini adalah antara pempetisyen dengan responden dan bukan dengan pemiutang individu yang berniat untuk tampil di dalam petisyen dan menyokong petisyen yang mungkin menjadi satu faktor relevan bagi pertimbangan semasa perbicaraan petisyen dan bukan di peringkat perbicaraan notis usul untuk membatalkan petisyen. Oleh itu, pemiutang yang menyokong tidak dibenarkan untuk turut serta di dalam perbicaraan notis usul kerana isu sama ada perintah penggulungan harus dibuat atau sama ada responden tidak mampu membayar hutang belum lagi timbul untuk pertimbangan mahkamah dan ia bukan pertimbangan muktamad di dalam notis usul ini (lihat perenggan 10).

(2) Seorang pemiutang tidak berbayar mempunyai hak untuk mendapatkan perintah penggulungan terhadap sebuah syarikat yang gagal membayar hutang bona fide. Walau bagaimanapun, mahkamah mempunyai kuasa budi bicara untuk menolak perintah atau membatalkan perintah jika didapati bahawa pemiutang telah bertindak salah dengan memfailkan petisyen tanpa mencuba untuk mendapatkan bayaran melalui cara lain (lihat perenggan 12)

(3) Petisyen penggulungan syarikat adalah satu perkara serius kerana ia menjejaskan reputasi syarikat, di dalam kes ini, satu syarikat yang tersenarai sebagai awam di mana hutang yang perlu dijelaskan kepada pempetisyen cuma RM50,786.34 dan ia sepatutnya boleh dimulakan dengan writ penyitaan dan jualan. Penyalahgunaan proses jelas di dalam tingkah laku pempetisyen yang mendesak responden untuk menyelesaikan bukan sahaja hutang penghakiman tetapi juga tuntutan-tuntutan oleh pemiutang sokongan (lihat perenggan 13).

(4) Pemfailan petisyen dan keinginan untuk meneruskan perbicaraan petisyen adalah tidak memuaskan dan kelihatan seperti satu langkah untuk mengganggu dan memalukan responden, untuk mendesak

responden ke tahap di mana responden diletakkan di bawah tekanan untuk tunduk kepada tuntutan pemiutang sokongan melalui pempetisyen atau bersemuka dengan ugutan atau risiko digulung. Oleh itu, kesan kumulatif daripada pemfailan petisyen dan untuk meneruskan dengan perbicaraan tidak seharusnya bertujuan semata-mata untuk mendapatkan semula hutang penghakiman yang perlu dibayar kepada pempetisyen atau melindungi kepentingannya, tetapi lebih kepada melaksanakan pungutan hutang (lihat perenggan 15).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1320–1472.

Cases referred to

A Company, In re [1915] 1 Ch 520, CA (refd)
Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors [1986] CLJ (Rep) 279, HC (refd)
Australian Mid-Eastern Club Ltd v Yassim [1989] 1 ACSR 400, CA (refd)
Bank Industri & Teknologi Malaysia Bhd v Alom Building System Sdn Bhd [2006] 4 MLJ 405, HC (refd)
Belmont Land Co (No 2), In re [1913] SC Vol 32 1017 (refd)
Blackman v Fysh [1892] 3 Ch 209, CA (refd)
Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corp Sdn Bhd (Com No 120265-P) [2001] MLJU 566, HC (refd)
Bostels Ltd, In re [1968] Ch 346, Ch D (refd)
Castle Coulson & MacDonald Ltd, In re [1973] 1 Ch 382, Ch D (refd)
Cetico Sdn Bhd v The Tropical Veneer Co Bhd [1988] 2 MLJ 665, HC (refd)
Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447; [1988] 1 CLJ (Rep) 5, SC (refd)
Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd [1997] 5 MLJ 377, HC (refd)
Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft [1999] 1 SLR 737, CA (refd)
Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd [1990] 1 MLJ 21, HC (refd)
Kolback Group Ltd ACN003 190 501 and The Companies (NSW) Code Technomin Aust NL v The Co [1991] 9 ACIC 511, SC (refd)
L & D Audio Acoustics Pty Ltd v Pioneer Electronic Australia Pty Ltd (1982) 7 ACLR 180, SC (refd)
Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd [1999] 5 MLJ 530, HC (refd)
Lympne Investments Ltd, Re [1972] 2 All ER 385, Ch D (refd)
Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53, PC (refd)

A *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58, HC (refd)
Norton Iron Co,The, In re [1877–78] 26 WR (refd)
Pavy's Patent Felted Fabric Co, In re (1876) 1 Ch D 631, Ch D (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100, SC (refd)
B *Piccadilly Property Management Ltd, Re* [1999] 2 BCLC 145, Ch D (refd)
Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd [2009] 5 MLJ 754, FC (refd)
SBA Properties Ltd, Re [1967] 1 WLR 799, Ch D (refd)
C *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509, SC (refd)
St Thomas' Dock Co, In re (1876) 2 Ch D 116, Ch D (refd)
Teng Foh t/a Teng Foh Construction v Liwu Realty Sdn Bhd [1989] 2 MLJ 425, HC (refd)
Teoh Vin Sen v True Creation Sdn Bhd [2008] 5 MLJ 311, HC (refd)
D *Tweeds Garages Ltd, In re* [1962] Ch 406, Ch D (refd)

Legislation referred to

Companies Act 1965 ss 217, 218(1)(e), (2)(a), 219, 221(1), 223, 226(4)
Companies (Winding Up) Rules 1972 rr 28(1), 32
E Evidence Act 1950 s 8

Kong Yit Har (Siva, Ram & Kong) for the petitioner and 61 supporting creditors.
Fehri Azaat (Syed Nasarudin bin Syed Al-Hadi with him) (Radzi & Abdullah) for the respondent.
F *Mura Raju (Mura Raju & Co) for the 101 supporting creditors.*

VT Singham J:

G **[1]** This is an application by way of notice of motion dated 12 June 2009 (encl 24) by the respondent that the winding up petition dated 28 April 2008 (encl 2) be struck out and the costs of this application be taxed and be paid forthwith by the petitioner and for any other or further relief as this court deems just and necessary.

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[2] The grounds of this application as raised in the said notice of motion are as follows:

(a) the respondent has the ability to pay the sum stated in the winding up I petition;

(b) the respondent had on 23 April 2009 issued a cheque in the amount of RM50,786.34 to the petitioner but was returned;

(c) the petition is frivolous and is an abuse of the process;

(d) the petitioner has no basis whatsoever to rely on s 218(1)(e) of the Companies Act 1965; and

(e) the petitioner failed to establish how it is just and equitable for the court to order the respondent to be wound up.

The notice of motion is supported by an affidavit affirmed on 11 June 2009 (encl 24A) by Tn Hj Mokhtar bin Mohd Salleh on behalf of the respondent.

[3] The petitioner has opposed this notice of motion. The following affidavits have been filed by both parties in respect of this notice of motion:

(a) affidavit in support of the notice of motion on behalf of the respondent (encl 24A);

(b) affidavit in reply of the petitioner to the notice of intention to oppose petition by the respondent and the said notice of motion (encl 27);

(c) further affidavit in reply by Mdm Kong Hit Har of M/s Siva Ram & Kong (encl 28), the solicitors for the petitioner and for 61 supporting creditors;

(d) affidavit in reply on behalf of the respondent (encl 32);

(e) further affidavit in reply on behalf of the petitioner (encl 34) to the respondent's affidavit in reply (encl 32);

(f) affidavit in reply (2) on behalf of the respondent (encl 36A); and

(g) affidavit in reply (3) of the petitioner (encl 37).

[4] As stated above, this is an application by the respondent to strike out the petition on the ground that it was an abuse of the process of the court as the petition was filed for a collateral purpose. For the sake of clarity and convenience, it is relevant to state briefly the chronology of events and the background facts of this case which are as follows:

(a) The petition to wind up the respondent company was filed on 28 April 2008 (encl 2). This petition was filed by the petitioner as a judgment creditor pursuant to a judgment dated 10 January 2007 vide summons No 52–166 of 2002 at the Sessions Court, Kuantan. The judgment sum is for RM30,538 with the interest at the rate of 8%pa from 5 October 2001 till satisfaction and RM4,305 as costs (see exh P1 which is attached to the petition);

(b) The petitioner's claim at the sessions court was for damages in respect of breach of the terms of a sale and purchase agreement to construct a single storey bungalow house where the petitioner had claimed that there were defects in the construction of the said building;

(c) The statutory notice dated 17 January 2008 under s 218(2)(a) of the Companies Act 1965 was issued to the respondent claiming a sum of RM51,204.03 which is made up as follows:

(i) Principal sum	RM30,538.00
(ii) Interest thereon at 8%pa from 5 October 2001–17 January 2008	RM16,361.03
(iii) Costs	RM4,305
Total	RM51,204.03

(d) As the respondent had failed or neglected to pay the said sum of RM51,204.03 within 21 days from the date of receipt of the said notice, the petition (encl 2) was filed in court on 28 April 2008 (see s 218(1)(e) of the Companies Act 1965);

(e) Affidavit of service of the petition on the respondent on 24 June 2008 was filed on 3 July 2008 (encl 7);

(f) Certificate of compliance under r 32 of the companies (Winding Up) Rules 1972 was filed on 5 September 2008 (encl 17);

(g) Notice of intention to appear on petition with the list of 61 creditors was tendered in court on 24 April 2009 in support of the petition by M/s Siva Ram & Kong, solicitors for the said supporting creditors who are also the solicitors for the petitioner (encl 18) (see r 28(1) of the Companies (Winding Up) Rules 1972);

(h) Notice of intention to appear on petition with the list of 101 creditors was tendered in court on 24 April 2009 by M/s Mura Raju & Co in support of the petition wherein Mr Mura Raju is also acting as counsel for the petitioner with Mdm Kong Yit Har of M/s Siva Ram & Kong (encl 19) (see r 28(1) of the Companies (Winding Up) Rules 1972);

(i) Affidavit in opposition on behalf of the respondent affirmed on 10 June 2009 was filed on 12 June 2009 (encl 21);

(j) By letter dated 22 April 2009, the respondent's solicitors M/s Radzi & Abdullah had sent a cheque for the sum of RM50,786.34 to the petitioner's solicitors M/s Siva Ram & Kong in settlement of the judgment sum (see exh HM1 attached to the supporting affidavit of the respondent encl 24A);

(k) By letter dated 23 April 2009, the petitioner's solicitors M/s Siva Ram & Kong had returned the said cheque for the said sum of RM50,786.34 to the respondent's solicitors on the ground that 'ia tidak mencukupi untuk membayar kesemua pemiutang-pemiutang', (the amount was insufficient to pay all the creditors) (see exh HM2 of encl 24A);

(l) By letter dated 29 May 2009, the petitioner's solicitors M/s Siva Ram & Kong addressed to the respondent's solicitors M/s Radzi & Abdullah had requested payment from the respondent to settle the two sets of creditors amounting to a total sum of RM8,639,327.12m. At this stage, it is important to disclose the contents of the said letter in verbatim which is as follows: (see exh HM3 of encl 24A):

Re: Kuantan High Court Winding Up No: 28-5-2008

Siti Esah Binti Talib Petitioner

Mentiga Corporation Sdn. Bhd Respondent

We refer to the above matter where the hearing of the winding up petition on 24.4.2009 was adjourned to 22.6.2009 at your request on the ground that your client, the respondent, will settle the petitioner's claim and all the supporting creditors' claims. One set of supporting creditors (61 in all) are represented by us while the other set (101 all in) are represented by Messrs Mura Raju & Co.

The total of all these claims as at 22.6.2009 is RM 8,639,327.12 made up as follows:-

(i) Total sum due to 61 judgment (supporting) creditors including the petitioner's claim, represented by us	RM3,347,412.40
(ii) To sum due to 101 judgment (supporting) creditors represented by M/s Mura Raju & Co.	RM5,291,914.72
Grand Total:-	RM8,639,327.12

Kindly ensure and arrange payment of the sums mentioned in (i) and (ii) above strictly in the form of bank drafts made payable as follows:-

(a) RM3,347,412.40 in the name of Messrs Siva, Ram & Kong (Clients' Account), and

(b) RM5,291,914.72 in the name of Messrs Mura Raju & Co. (Clients' Account).

On or before 22.6.2009 whereupon we will withdraw the petition and have it struck off with costs/no order as to costs.

BUT if we do not receive the said sum as stated we shall proceed with the winding-up of the respondent.

We trust you will do the needful

Yours faithfully,

t.t

SIVA, RAM & KONG

c.c Messrs Mura Raju & Co

A Advocate & Solicitors,

B-50, First Floor,

Lorong Air Putih 2,

Off Jalan Beserah,

B 25300 Kuantan

(Ref: MR/6753/nz)

(m) Notice of motion with the supporting affidavit was filed on 12 June C 2009 by the respondent's solicitors (encl 24 and encl 24A);

(n) *Perakuan segera* dated 11 June 2009 by the respondent's solicitors to hear the notice of motion was filed on 12 June 2009 (encl 23);

(o) Notice by respondent of intention to oppose the petition dated 3 June D 2009 was filed by the respondent's solicitors on 5 June 2009 (encl 25);

(p) Hearing of the petition was fixed on 8 September 2008 at High Court 2 Kuantan and was adjourned to 27 February 2009;

(q) The hearing of the petition which came up for hearing on 27 February E 2009 at High Court 1 was adjourned to 24 April 2009 at the request of the petitioner's counsel pending the decision on the application for stay by the respondent vide Appeal No 12–82 of 2007 at High Court 2;

F (r) The hearing of the winding up petition was adjourned to 24 April 2009 at the request of the respondent's solicitors as they wanted to settle the debt due to the petitioner. As the petitioner's counsel had agreed to the adjournment, the hearing of the petition was adjourned to 22 June 2009 pending settlement;

G (s) On 22 June 2009, the hearing of the petition was adjourned to 28 July 2009 as the petitioner's solicitors intended to reply to the *afidavit jawapan* of the respondent which was served only in the morning on 22 June 2009 (encl 34);

H (t) In the meantime, on 28 July 2009, the respondent's application for stay was dismissed by the learned judicial commissioner of the High Court 2, Kuantan. The respondent had filed an appeal to the Court of Appeal against the dismissal of the application for stay and the appeal is pending;

I (u) On 28 July 2009, the notice of motion was adjourned to 15 October 2009 as the respondent's counsel who is from Kuala Lumpur had left his bundle of authorities and the written submission in Kuala Lumpur;

(v) On 15 October 2009, in addition to the written submission having been filed, the parties had also made oral submission in respect of the notice of motion (encl 24) and the hearing was adjourned to 21 January 2010 pending further submission from the parties;

(w) On 21 January 2010, notice of motion (encl 24) was called up and adjourned to 23 February 2010 as further submission was received by this court late and only on 19 January 2010;

(x) On 23 February 2010, the case was not called as parties were informed that the decision for encl 24 will be delivered on 25 February 2010 and subsequently the decision was adjourned to 25 February 2010.

Learned counsel for the respondent had referred to the following cases:

(a) *Teng Foh t/a Teng Foh Construction v Liwu Realty Sdn Bhd* [1989] 2 MLJ 425;

(b) *Datuk Mohd Sari bin Datuk Hj Nuar v Idris Hydraulic (M) Bhd* [1997] 5 MLJ 377;

(c) *Apirami Sdn Bhd v Tamil Nesan (M) Sdn Bhd & Ors* [1986] CLJ (Rep) 279;

(d) *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447; [1988] 1 CLJ (Rep) 5;

(e) *Teoh Vin Sen v True Creation Sdn Bhd* [2008] 5 MLJ 311;

(f) *Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd* [1999] 5 MLJ 530; and

(g) *Bank Industri & Teknologi Malaysia Bhd v Alom Building System Sdn Bhd* [2006] 4 MLJ 405.

[5] On the other hand, learned counsel for the petitioner together with the solicitors for the supporting creditors have referred to the following cases:

(a) *Re SBA Properties Ltd* [1967] 1 WLR 799;

(b) *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737;

(c) *Re Piccadilly Property Management Ltd* [1999] 2 BCLC 145;

(d) *In re Belmont Land Co (No 2)* [1913] SC Vol 32 1017;

(e) *Australian Mid-Eastern Club Ltd v Yassim* [1989] 1 ACSR 400

(f) *In re Pavy's Patent Felted Fabric Co* [1876] 1 Ch D 631;

(g) *In re The Norton Iron Co* [1877–78] 26 WR

A (h) *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53;

(i) *In re Bostels Ltd* [1968] Ch 346;

(j) *In re Castle Coulson & MacDonald Ltd* [1973] 1 Ch 382;

B (k) *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100;

(l) *Cetico Sdn Bhd v The Tropical Veneer Co Bhd* [1988] 2 MLJ 665;

(m) *In re Tweeds Garages Ltd* [1962] Ch 406;

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(n) *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21; and

(o) s 223 and s 226(4) of the Companies Act 1965.

D DECISION

[6] On going through the notice of motion (encl 24), the supporting affidavit (encl 24A) and all the affidavits filed by both parties in respect of encl 24, and the submission with the authorities and upon further research E carried out by this court, the decision of this court is:

[7] The main issue for this court to decide at this stage of the hearing of this notice of motion (encl 24), in particular, grounds (b) and (c) which are to be F read together is, whether the petition (encl 2) was filed for the sole purpose and object of recovering the judgment sum obtained by the petitioner or for any collateral purpose and to exert pressure on the respondent to settle the claims of other creditors as contained in the two list of supporting creditors. Consequently, whether there is any abuse of the process of the court. At this G stage, it is not appropriate for this court to consider whether the respondent/company is solvent or not and that it is just and equitable to wind up the respondent-company as that is a matter which should be left to be decided at the hearing of the petition (see s 218(1)(e) of the Companies Act 1965).

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(a) It is to be noted that the petition (encl 2) was filed pursuant to a judgment sum, being RM50,786.34 obtained on 10 January 2007 by the petitioner as a judgment creditor against the respondent;

(b) At the time when the statutory notice dated 17 January 2008 was issued I to the respondent, the sum then due was RM51,204.03. However, the respondent had failed or neglected to settle the said sum within the said period of 21 days. Consequently, the petition was filed against the respondent on the ground that they are deemed to be unable to settle the judgment sum as claimed by the said notice of demand;

(c) However, by a letter dated 22 April 2009, the respondent's solicitors had sent the sum of RM50,786.34 to the petitioner's solicitors in full settlement of the debt but the payment was rejected. The cheque was returned by the petitioner's solicitors by letter dated 23 April 2009 on the ground that 'ia tidak mencukupi untuk membayar kesemua pemiutang-pemiutang';

(d) This court is of the considered view that there is no impediment to settle the judgment sum or debt even after the time stipulated in the statutory notice to the respondent had passed or even after the petition is filed in court as this will depend on the facts and circumstances of the particular case and is on a case to case basis;

(e) The grounds as stated in the letter dated 29 May 2009 (exh HM3 of encl 24A) by the petitioner's solicitors for refusing to accept the payment has cast doubt on the bona fide of the petitioner since the petition which was filed ought to have been for the sole purpose of recovering the judgment sum obtained by the petitioner and not to collect the alleged debts of the supporting creditors.

> 'The object of a creditors petition to wind up is to get paid; a creditors petition ought to be presented with no other object,' (per Jessel, MR in *In re St Thomas' Dock Co* (1876) 2 Ch D 116 at p 118).

(f) It is not denied from the authorities that the petitioner has the option, whether or not to accept the payment in settlement of the debt due to her and this is her right in view of s 219 of the Companies Act 1965 (see *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2009] 5 MLJ 754 at pp 756–767). However, the abuse of the process arises when the petitioner's explanation in refusing to accept the said sum upon considering in its totality appears to be not a bona fide petition and coupled with the fact that she has contradicted herself on the reasons for refusing to accept the payment;

(g) The basis of the petition appears to be that the respondent is unable to settle the judgment debt being RM50,204.03 due to the petitioner as at 17 January 2008. However, the payment when tendered was rejected on the ground that the amount was insufficient to pay all the creditors. However, the grounds raised in the affidavit in reply of the petitioner (encl 27) for refusing to accept the payment conflicts with the ground as raised in the letter dated 29 May 2009 (exh HM3). By para 5(iii)(b) and (c) of the affidavit in reply (encl 27), the petitioner has advanced entirely a different set of reasons for having rejected the payment, ie; first, the amount of RM50,786.34 was not the full sum of her claim as the sum due on the date of hearing the petition on 24 April 2009 was RM53,289.62 and secondly, the petitioner's solicitors felt 'that accepting such payment from the respondent would amount to undue

A preference to the prejudice of the other 61 supporting creditors'. The grounds as raised by the affidavit in reply which was affirmed on 15 June 2009 (encl 27), is obviously an after thought and is in conflict with the original reason for refusing to accept the payment as contained in the letters dated 23 April 2009 and 29 May 2009 (exh HM2 and B HM3).

[8] This court is of the considered view that the date of filing the petition need not necessarily be the determining factor as to whether the petition was filed for a collateral purpose and to exert pressure on the respondent to settle C the alleged debts of the supporting creditors. The conduct of any party, in the instant case, the petitioner, subsequent to the filing of the petition is also a relevant fact to consider the fact in issue as to whether the petition was filed for collateral purpose (see s 8 of the Evidence Act 1950). Evidence of subsequent conduct is relevant under s 8 of the Evidence Act 1950 in any D proceedings and may properly be taken into account, in the instant case, the demand made by the petitioner to settle the alleged debt of the supporting creditors amounting RM8,639,327.12m to reinforce the fact in issue that the petition was filed for a collateral purpose as it has a direct relation between the conduct and the fact in issue. At this stage, it is important to be reminded E that the judgment debt due to the petitioner at the time when the statutory notice was issued under s 217 of the Companies Act 1965 was only RM51,204.03 as on 17 January 2008.

F **[9]** The legal battle in this notice of motion is between the petitioner and the respondent and it is not between the individual creditors who intent to appear on the petition and to support the petition which may be a relevant factor for consideration at the hearing of the petition and not at this stage of the hearing of the notice of motion to strike out the petition (see s 221(1) of G the Companies Act 1965). Therefore, the supporting creditors ought not to be allowed to participate in this hearing of the notice of motion as the issue of whether the order of winding up ought to be made or the respondent is unable to pay their debts did not arise as yet for consideration of this court and it is not a decisive consideration in so far as this notice of motion. The H supporting creditors rightfully have no locus at this stage of the hearing of the notice of motion to strike out the petition which is based on the ground that it is filed for a collateral purpose by the petitioner and not bona fide and this issue is a matter entirely personal to the respondent and is against the petitioner. However, learned counsel of the supporting creditors of the second I list (encl 19) was allowed to submit to assist the court to arrive at a just decision.

[10] This court is in agreement with the contention of learned counsel for the respondent that what is being tested in a striking out application is not

the solvency of the respondent but the bona fide of the petitioner's winding up petition and whether it is for a collateral purpose. This issue is personal against the petitioner.

> … A Petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that I would dismiss this action (per Plowman J in *Re Bellador Silk Ltd* [1965] 1 All ER 667).

[11] This court finds there is no reason advanced on behalf of the petitioner why she did not exhaust or take another adequate means or mode of action, among others, by a writ of seizure and sale to recover the said judgment sum of RM50,786.34. In addition, there are also other alternative means and more appropriate modes of recovering the judgment debt due to her by the respondent. The list of processes of execution is not closed as execution is any process of the court designed to enforce a judgment. It must be, in the instant case be only for the purpose of enforcing the judgment debt obtained by the petitioner against the respondent (see *Blackman v Fysh* [1892] 3 Ch 209 at p 217). A creditor is entitled pursuant to the Companies Act 1965, to present a petition for winding up a company for non-payment of a judgment debt. Consequently and prima facie, an unpaid creditor has a right to obtain a winding up order against a company which fails to pay its bona fide debt. However, the court has discretion to refuse the order or to strike out the petition if it is found the creditor has acted improperly by filing a petition without attempting to obtain payment by other means (*In re St Thomas' Dock Co* (1876) 2 Ch D 116 at pp 118–119).

[12] A petition for winding up a company is a serious matter as it affects the reputation of the company, in this case, a public listed company where the debt due to the petitioner is only RM50,786.34 and it could have been proceeded by way of writ of seizure and sale. The abuse of the process is clearly shown in the conduct of the petitioner where she had exerted pressure on the respondent to settle not just the judgment debt due to her but the alleged claims of all other supporting creditors as well.

In *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58 Shankar J (as he then was) said at p 64 that:

> Great damage may obviously be done to solvent company by a winding-up petition presented by an unreasonable creditor, whose debt the company are able and willing to pay if established.
>
> A company that has proven itself to be commercially solvent, has the right to protect itself from being disturbed by a creditors' petition to wind it up. And if it can be determined that the petition is (to use the test in *Bryanstone Finance*) bound to fail, an injunction will lie. And to this may be added a rider. A creditor choosing

A to enforce his right to a debt by petitioning for the winding up a company must act bona fide in pursuant of such a right. A failure to do so is an abuse of the process of the court. A judgment creditor will not be acting bona fide if a direct alternative means of recovering his debt by a writ of seizure and sale under O 45 r 1(a) is available to him and he chooses not to pursue it. Provided there is a valid B reason why that alternative means is not resorted to, it would be perfectly legitimate for the court to adopt the Bentham utilitarian approach to injunct the creditor from presenting the petition in order to prevent the company from suffering more harm than necessary.

'The winding up order is without doubt a drastic remedy, a sledge hammer C remedy' (per Wan Sulaiman FJ in *Tahansan Sdn Bhd v Tay Bok Choon* [1985] MLJ 58).

For a holding company which is publicly listed it can be assumed that the issue and pendency of winding up proceedings are damaging to its credit and reputation (*Re Kolback Group Ltd* (Bryson J) 4 ACSR 165 p 173).

D 'Although it took more than a year since the petition for winding up was filed to hear the petition, some laws of judicial time would not be too high of price to pay in order to maintain confidence in the administration of justice in this jurisdiction' (per Gunn Chit Tuan J (as he then was) in *David Anthony v Public Prosecutor* [1985] 1 MLJ 453 at p 456)

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[13] On the totality of the material in evidence, the inference that can be drawn is that, the petitioner has a collateral purpose where she had in fact exerted pressure on the respondent to settle the alleged debts of other parties, namely, the two set of supporting creditors. Accordingly, the interest and F object of the petitioner to recover her judgment debt by this petition for winding up did not seem to be the primary purpose of filing and proceeding with the hearing of the petition. The general rule of equity is that the petitioner's primary purpose of filing the petition for winding up should have been to recover the judgment debt due to the petitioner and a petitioner G would not be allowed to proceed with the hearing of the petition where the primary purpose appears to be clouded with the interests of other creditors who have claimed for their alleged debt through the petitioner.

Megarry J in the case of *Re Lympne Investments Ltd* [1972] 2 All ER 385 at p 389 said:

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The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as I a means of resolving dispute …

In *In re St Thomas' Dock Co* (1876) 2 Ch D 116 Jessel MR said at p 118:

The object of a creditors' petition to wind up is to get paid; a creditors' petition ought to be presented with no other object.

[14] The presentation of the petition and the eagerness to proceed with the hearing of the petition is much to be desired and appears to be a calculated move to harass and embarrass the respondent, to exert pressure on the respondent to such an extent that the respondent is put under pressure to submit to the demand of the supporting creditors through the petitioner or to meet the threat or risk of being wound up. The sequent of events, the conduct of the petitioner and the filing of the various documents by the petitioner's solicitors who are also representing the 60 other creditors in support of the petition is so inter-linked that they are inseparable. Accordingly, the cumulative effect of filing the petition and to proceed with the hearing could not have been for the sole and genuine purpose of recovering the judgment debt due to the petitioner or to protect her interest but is more of a debt collecting exercise.

> An endeavour to obtain an improper advantage is in my view the stark, simple and only characterisation which could be given to the whole proceedings' (per Bryson J in *Re Kolback Group Ltd* 4 ACSR 165 at p 175).

[15] As stated above, the petitioner has other mode or alternative means of recovering the judgment debt which later was increased to *RM51,204.03* at the time when the statutory notice of demand was issued but instead, the petitioner chose to file this winding up petition, which is a drastic step to recover a sum of *RM51,204.03* from a public listed company where the consequences upon a winding up order may result in disaster and has detrimental effect on the respondent. On the set of facts and in the light of what this court has said earlier in this judgment, this court finds that the primary purpose of filing and proceeding with the hearing of the petition appears to be clouded with conflict of interest and cannot be for the sole purpose of protecting the interest of the petitioner or to recover the judgment debt due to the petitioner. There must be fairness, equitable and conscionable conduct on the part of the petitioner which this court finds is lacking.

> A petition for the winding up of a company is a grave matter for the company and those who have dealings with the company. There are important consequences that affect a variety of matters as stipulated in s 219(2) of the Companies Act 1965. The cumulative effect and the consequences that a company, upon a petition for winding up presented against it, cannot carry on business as outsiders will be reluctant to have dealings with it (per Sinnathuray J in *Re Pentasia (Pte) Ltd* [1979] 2 MLJ 59 at p 60).

[16] On the set of facts and the circumstances of this case, the reasonable inference that can be drawn is that, the petition was filed not for the sole purpose or object of recovering the judgment debt due to the petitioner. The subsequent conduct of the petitioner has revealed that it was filed for a collateral purpose and this came to light upon considering the facts on its

totality. Consequently, as contended by learned counsel for the respondent, this court is in agreement that it is an abuse of the process of the court to allow the petitioner to proceed with the winding up petition.

> An application made for some improper purpose, is well established and equips the court to deal with opportunities for abuse of process which take special forms in relation to winding up applications because of the impact that the mere commencement and also advertisement and pendency of such proceedings can have on a company and its affairs (*Re Kolback Group Ltd* (Bryson J) 4 ACSR 165 at p 173).
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> The pendency of such an application is disruptive of the affairs not only of the company but also of other persons, including persons dealing with it and wishing to deal with it. Its pendency is a considerable disadvantage to the company in carrying on business. Many persons are affected in the present case as the company is publicly listed (In *Re Kolback Group Ltd* 4 ACSR 165 at p 175).

[17] On the facts and circumstances of this case, this court is satisfied that the winding up petition if allowed to proceed would be an abuse of the process of the court as it was filed for a collateral purpose, in particular, for the benefit of and to collect the alleged debt of the supporting creditors. It has been shown that the petitioner has exerted pressure on the respondent to pay not only the judgment debt obtained in her favour but to settle or meet the alleged debt of all other supporting creditors. This court will not make any express finding of any conspiracy between the petitioner and the supporting creditors as contended on behalf of the respondent as the facts when considering in its proper and judicial perspective speaks for itself.

In *In re A Company* [1915] 1 Ch 520, Phillimore LJ said at p 528:

> She is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode by which she no longer seeks to recover for herself alone but for the benefit of all the creditors.

As Jessel MR said in *In re St Thomas' Dock Co* (1876) 2 Ch D 116:

> The petition may be and probably is, presented with the idea of getting paid, not of getting paid under the winding up, but of getting paid by reason of the company not daring to meet the threat or risk of being wound up, which is — I will not say an illegitimate use, but not the primary use of a petition for winding up of a company.
>
> Abuse of process as a ground upon which presentation or continuance of winding up proceedings may be restrained has had recurring attention and some characteristic forms of abuse of process are well established and clearly recognised (*Re Kolback Group Ltd* (Bryson J) 4 ACSR 165 at p 173).

In *L & D Audio Acoustics Pty Ltd v Pioneer Electronic Australia Pty Ltd* (1982) 7 ACLR 180 at p 183, Mc Lelland J said:

Proceedings by a person as creditor for the winding up of company on the ground that it is unable to pay its debts will ordinarily be held to be an abuse of process:

(a) if the application is made for some improper purpose eg if the applicant is seeking to use the winding up proceedings to coerce into paying a debt without giving the company a reasonable opportunity to ascertain or have it established that the debt is properly payable.

[18] The facts in respect of the cases referred to on behalf of the petitioner can be distinguished on the set of facts, background and the circumstances in the instant case and it is limited to its own sets of facts as distinguished and submitted by learned counsel for the respondent and does not assist the petitioner to enable this court to dismiss this notice of motion but for the principles of law. In any event, one thing must be made clear that the petitioner cannot use the winding up proceedings to compel the respondent to settle the alleged claims of the supporting creditors as contained in encl 18 and encl 19 as that method of enforcing the judgment debt due to the petitioner would be an abuse of the process of the court. In fact, a petition filed for an improper purpose was dismissed as an abuse of process (see *Kolback Group Ltd ACN003 190 501 and The Companies (NSW) Code Technomin Aust NL v The Co* [1991] 9 ACIC 511).

[19] In the circumstances and in accordance with the rules of reasons and justice, this court finds that on the set of facts and circumstances as stated above, this court ought to, and is an appropriate case for this court, in the exercise of its discretion to strike out the petition as prayed for in the notice of motion (encl 24). (see *Boey Oi Leng (t/a Indah Reka Construction & Trading) v Trans Resources Corp Sdn Bhd (Com No 120265-P)* [2001] MLJU 566; *Si & Si Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509).

[20] Accordingly, prayer (a) of the notice of motion is allowed, ie; the winding up petition dated 28 April 2008 (encl 2) is struck out and prayer (b), the costs of this application is allowed and to be paid by the petitioner. Costs is to be taxed, if there is no agreement.

Petition struck out with costs.

Reported by Ashgar Ali Ali Mohamed